Supreme Court, U.S.
FILED
MAR 30 2005
OFFICE OF THE CLERK

(5)

No. 04-809

In the Supreme Court of the United States

NORFOLK DREDGING COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA AND BEAN STUYVESANT, L.L.C.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The briefs in opposition are most notable for what they fail to say. Respondents make no serious attempt to deny the enormous importance of this case to the vitality of a crucial domestic industry – a point that is graphically demonstrated by the broad amicus support for the petition from organized labor and the United States maritime industry. Respondents also do not really deny that the Federal Circuit's approach allows all foreign entities that are associated with SDC to expand their operations in the United States without limit; that the holding below gives those foreign companies huge competitive advantages over domestic firms; or that those foreign businesses could come to dominate the United States dredging market. And respondents do not even try to explain why Congress, in closing a loophole in the cabotage laws, would countenance such a result.

The United States does contend that the case is moot. If the Government were correct in that assertion, the proper outcome would be for the Court to *grant* the petition, vacate the judgment, and remand the case with instructions that it be dismissed as moot. But the United States is wrong: the dispute here remains live. Because the issue presented is an important and recurring one, and because the approach to statutory construction embraced by the court below is in clear tension with this Court's teaching, further review is warranted.

A. The Case Is Not Moot.

1. The Controversy Remains Live.

The United States, but not its co-respondent Bean Stuyvesant, asserts that the case is moot because the *Meridian* completed its work under the contract on January 31, 2005. U.S. Opp. 6. That argument is wrong.

Contrary to the United States' description (U.S. Opp. 6), Norfolk's complaint did not seek "solely" to enjoin the Government from awarding one specific contract to Bean Stuyvesant. Rather, Norfolk additionally sought "[a] declaratory judgment that Bean Stuyvesant is a foreign corporation that is subject to the proscriptions contained in 46 App. U.S.C. § 292 and, as such, it is prohibited from conducting dredging operations in United States waters and it is not qualified or eligible to receive an award of contracts on Federal dredging solicitations." Compl. ¶ 5.

"Where several forms of relief are requested and one of those requests subsequently becomes moot, the Court has still considered the remaining requests." *Powell* v. *McCormack*, 395 U.S. 486, 496 n.8 (1969). In particular, "[a] court may grant declaratory relief even though it chooses not to issue an injunction * * *." *Id.* at 499. Petitioner's request for declaratory relief remains vital in at least two respects.

First, a declaratory judgment in Norfolk's favor would undoubtedly affect future bid contests. Declaratory judgment is appropriate where "the challenged governmental activity * * * is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 122-23 (1974) (mooting of injunction request did not moot case, where plaintiff had also sought declaratory judgment). Here, it is a virtual certainty that Norfolk will compete against Bean Stuyvesant or other SDC affiliates in future bid solicitations; whether those entities are eligible to receive such contracts obviously will affect the bidding and the award.

Second, a declaratory judgment in Norfolk's favor could "be used as a predicate to further relief" (*ibid.*) in the form of damages for Norfolk's costs in preparing its bid for this contract. *Gull Airborne Instruments, Inc.* v. *Weinberger*, 694

F.2d 838, 846 n.10 (D.C. Cir. 1982) ("[E]ven if the claim for injunctive relief is extinguished by mootness, Gull may retain a viable claim for damages to the extent of its bid preparation costs."); 28 U.S.C. § 1491(b)(2) (similar). See generally *Christopher Village, Ltd. P'ship* v. *Retsinas*, 190 F.3d 310, 315 (5th Cir. 1999) (holding that declaratory judgment could be used "as a predicate for a damages action against [the government] in the Court of Federal Claims") (quoting *Powell*, 395 U.S. at 499). But see *James Luterbach Constr., Inc.* v. *Adamkus*, 781 F.2d 599, 603 (7th Cir. 1986) (damages must have been sought in complaint in present action to save case from mootness).

Moreover, even if this case otherwise would be moot, it cries out for application of the "capable of repetition but evading review" exception, which applies where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) *(per curiam)* (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)) (internal quotation marks omitted). Here, according to the Government's own account (U.S. Opp. 6), the *Meridian* completed its work on the contract in just over five months—hardly enough time for Norfolk to procure a grant of certiorari *and* a decision on the merits from this Court, especially where the United States sought and obtained two extensions of time to file its brief in opposition. Other contracts almost invariably will be completed within a similar time-frame: non-hopper dredges typically complete their contractual duties within a short period of time. And, as explained above, Norfolk and Bean Stuyvesant undoubtedly will be rival bidders on future dredging contracts. Several circuit courts have found the "capable of repetition" exception to mootness applicable in very similar circumstances. See, *e.g.*, *Ameron, Inc.* v. *U.S. Army Corps of Eng'rs*, 787 F.2d 875, 881 (3d Cir. 1986);

Kinnett Dairies, Inc. v. *J.C. Farrow*, 580 F.2d 1260, 1266 (5th Cir. 1978).

2. *If the Case Is Moot, The Court Should Grant The Petition, Vacate The Judgment, And Remand With Instructions To Dismiss.*

If the Court disagrees and concludes that the case is moot, however, the United States still is wrong in contending that certiorari should be denied. Rather, when a case becomes moot during the pendency of a petition for certiorari, the Court's "established practice * * * is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). See also *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997). "Vacatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review." *Ibid.* (quoting *Munsingwear*, 340 U.S. at 40). This principle has been applied by several courts in the specific context of a dispute over a government contract award that becomes moot by virtue of performance of the contract by the winning bidder. See, *e.g.*, *Columbian Rope Co.* v. *West*, 142 F.3d 1313, 1318 (D.C. Cir. 1998) (cited at U.S. Opp. 6); *Fauconniere Mfg. Corp.* v. *Sec'y of Defense*, 794 F.2d 350, 352 (8th Cir. 1986).

When a case becomes moot while a petition for a writ of certiorari is pending, this Court routinely issues a summary order granting the petition, vacating the judgment below, and remanding with directions to dismiss. See, *e.g.*, *Lehman* v. *MacFarlane*, 529 U.S. 1106 (2000); *United States* v. *Weatherhead*, 528 U.S. 1042 (1999); *Teel* v. *Khurana*, 525 U.S. 979 (1998); *Joint School Dist. No. 241* v. *Harris*, 515 U.S. 1154 (1995); *NTA Graphics, Inc.* v. *NLRB*, 511 U.S. 1124 (1994) (granting Government's motion for such relief); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993); *Seif* v. *Chester Residents Concerned For Quality Living*, 524 U.S. 974 (1998). See generally CHARLES ALAN WRIGHT, ARTHUR

R. MILLER & EDWARD H. COOPER, 13A FEDERAL PRACTICE & PROCEDURE § 3533.10, at 434-35 & n.31 (2d ed. 1984 & 2004 Supp.) (collecting additional cases reflecting "this [Court's] practice [of] summarily granting certiorari, vacating, and remanding to dismiss—often with a citation to the *Munsingwear* decision"; observing that "[t]here is no need for change" in this practice). Following that course is especially appropriate in this case, where the issue is important, the decision below is doubtful, and that decision—if unreviewable on mootness grounds but left unvacated—will govern future bid protests, whether by Norfolk or other domestic dredging contractors.

B. The Issues Presented Here Warrant Review By This Court.

1. Respondents Barely Address The Petition's Showing That The Federal Circuit's Decision Is One Of Enormous Practical Importance.

The petition described in detail the significant impact that the Federal Circuit's decision will have on the domestic dredging industry. That decision allows SDC (or any foreign entity in which SDC has even a minimal ownership interest, such as Bean Stuyvesant) to expand its U.S. dredging business virtually without limit.[1] And it confers numerous advantages upon SDC that pave the way for its domination of the U.S. dredging market: SDC, unlike U.S. dredging operators, (1) may adjust to changing market conditions by redocumenting its vessels under a foreign flag, and then bringing the vessels back under U.S. flag at a later date; (2) may

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[1] Although the United States asserts that Clause (A)(iii) contains "specific limits" (U.S. Br. 9), on examination the provision requires only that the charter of a non-hopper dredge be necessary "to fulfill dredging obligations under a specific contract" – which describes *every* relevant charter, because *all* dredging is performed under a "specific contract."

engage in transfer pricing or transfer profits overseas; (3) enjoys access to foreign capital; and (4) may operate in certain foreign countries such as Iran. Pet. 12-16. *Amici* elaborate on these points. See Br. of *Amici Curiae* Dredging Contractors Of America, *et al.* 14-17.

The United States does not deny that these competitive advantages will accrue to SDC and its affiliated entities, to the detriment of the domestic dredging industry. Instead, it simply asserts without explanation or support that the prospect of SDC's domination of the domestic dredging market is "implausible." U.S. Opp. 9. As for respondent Bean Stuyvesant, it offers only a conclusory denial of the petition's showing. Bean Stuyvesant Opp. 4-5. But the competitive effects sketched in the petition are inarguable; in fact, the petition cited a Congressional Budget Office report indicating that Bean Stuyvesant's market share of contracts let by the U.S. Army Corps of Engineers rocketed from zero prior to fiscal year 1999 to 17% in fiscal year 2001-02. Pet. 15 (citing CBO Letter Report (Oct. 21, 2003) (available at http://www.iwr.usace.army.mil/ndc/dredge/dredge.htm)). Respondents make no response to this point.

The United States also contends that the dramatic impact of the Federal Circuit's decision does not warrant this Court's review because there is no conflict in the circuits. U.S. Opp. 10. But the Government does not dispute our claim (Pet. 15) that the Federal Circuit is the *only* court of appeals with jurisdiction to review appeals from bid protest determinations.[2] The United States instead suggests that

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[2] See *PGBA, LLC* v. *United States*, 389 F.3d 1219, 1227 (Fed. Cir. 2004) (describing legislation that gave Court of Federal Claims exclusive jurisdiction over bid protests as of January 1, 2001); 28 U.S.C. §§ 1295(a)(3) (granting Federal Circuit exclusive appellate jurisdiction to review final decisions of the Court of Federal Claims) and 1292(c) (granting Federal Circuit exclusive appellate

Norfolk and other domestic dredging concerns could somehow foment a circuit split by seeking Administrative Procedure Act review in various circuits of the Customs Service's private-letter rulings interpreting the Oceans Act. U.S. Opp. 10. This suggestion, however, is remarkable, and wholly infeasible in practice: the United States would have domestic dredging companies engage in the futile exercise of requesting unfavorable private letter rulings from the Customs Service, for the sole purpose of forum-shopping the judicial review of those rulings. The reality is that bid protests are the form that these disputes inevitably will take in the future, and the Federal Circuit is the only court of appeals with jurisdiction to review those protests. Accordingly, the importance of the issue, rather than the presence or absence of intercircuit conflict, should guide this Court's decision whether to grant the petition.

2. Respondents Are Wrong In Contending That The Federal Circuit's Interpretation Of The Oceans Act Is Correct.

In defending the decision below, the United States and Bean Stuyvesant rely in large part upon their contention that the language of the Oceans Act is plain and supports the Federal Circuit's reading. U.S. Opp. 7; Bean Stuyvesant Opp. 6. But the Federal Circuit's holding rested crucially upon the assumption that, where clauses of a statutory provision are "self-contained" and "semi-colon delimited," the clauses are "independent of each other."[3] Pet. App. 7a. This proposition

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jurisdiction to review interlocutory orders where final decision would be within Federal Circuit's exclusive appellate jurisdiction).

[3] The Government contends that this principle is unremarkable. U.S. Opp. 7 n.1. But the lone case it cites demonstrates that semicolons are *not* to be treated as steel traps. See *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960). There, this Court, when faced with the task of interpreting the word "obstruction" in the first part of a statute, looked to the second part of the statute (sepa-

is in tension, to say the least, with this Court's view that "statutory language must be read in its proper context and not viewed in isolation." *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 125 S. Ct. 460, 467 (2004). See also Pet. 19-20 & n.10 (citing similar decisions by this Court and lower courts). Adopting the Federal Circuit's mistaken approach, the United States and Bean Stuyvesant make no attempt to read the provisions in context or explain why Congress tied them all to the hopper dredge *Stuyvesant*. See Pet. 21. Nor do they provide a persuasive basis to distinguish the canon that, where ambiguity remains as to the meaning of a grandfather clause, the clause must be strictly construed. Pet. 22. Finally, neither the United States nor Bean Stuyvesant make any attempt to reconcile their isolated reading of subparagraph (A)(iii) with the clear statutory purpose of the Oceans Act, which they do not deny was to close loopholes in existing cabotage laws.

The United States does argue that some of the same statements appear in the legislative history of both the Oceans Act and an earlier version of the legislation that would have limited the grandfather exception to only "the vessel STUYVESANT." U.S. Opp. 8-9. But the logical inference to draw from the repetition of these statements in connection with the statutory language actually enacted is that they continued to inform Congress's understanding of the legislation's scope. As the Court of Federal Claims explained:

> [T]he amendment as finally enacted * * * first was presented to the House of Representatives. *After reading the language in question*, Representative Tauzin stated: "This amendment would close loop-

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rated from the first part by a semi-colon). *Id.* at 486. That is precisely the "holistic" interpretive method reaffirmed in *Koons Buick Pontiac* and applied by the Court of Federal Claims, but not the Federal Circuit, in this case.

> holes in the Federal law. It has been written in co-operation with the U.S. dredging operators and grandfathers existing foreign-owned fleets."

Pet. App. 45a (quoting 138 Cong. Rec. 15647) (emphasis added).[4] Thus, the legislative history points toward the same narrow reading of subparagraph (A)(iii) as do the interpretive canons discussed above, and further demonstrates that the Federal Circuit erred.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for plenary review. If, however, the Court concludes that the case is moot, the Court should grant the petition, vacate the judgment, and remand with instructions to dismiss the case as moot.

Respectfully submitted.

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[4] The Government omits this part of the Court of Federal Claims' opinion from its quotation of the opinion at U.S. Opp. 9 n.2.